No. 339

CHARLES ELMORE CROPL
CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

v.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

PROCEEDINGS IN HABEAS CORPUS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER,
LEONARD LEVAND,
of Wichita, Kansas,
Attorneys for Petitioner.

To the Honorable Fred M. Vincent, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

v.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

ORIGINAL PROCEEDINGS IN HABEAS CORPUS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vincent, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

PETITION FOR WRIT OF CERTIORARI.

IF THE COURT PLEASE:

The petitioner, hereinafter referred to for the sake of clarity as defendant, petitions this honorable Court for a writ of certiorari in the above entitled cause to the Supreme Court of the State of Kansas.

SUMMARY STATEMENT OF MATTER INVOLVED.

The instant action involves a question of the right of the State of Kansas to subject the defendant for the same offense to be twice put in jeopardy of life or limb, under the constitutional guarantee provided by the Fifth Amendment to the Constitution of the United States and Section 10 of the Bill of Rights of the Constitution of the State of Kansas.

On May 9, 1949, the defendant, having had a preliminary hearing, upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas, was bound over to the District Court of Sedgwick County, Kansas, upor a felony charge of receiving stolen property over the value of $[illegible]0.00 knowing the same to have been stolen.

An information was filed in the District Court of Sedgwick County, Kansas, attempting to charge the crime aforesaid and upon motion of the defendant it was quashed upon the ground that it did not state facts sufficient to constitute an offense against the laws of the State of Kansas.

Subsequently an amended information was filed and likewise upon motion of the defendant it was quashed upon the same grounds heretofore stated.

On December 23, 1949, a second amended information was filed and the defendant's motion to quash same was overruled ~~November 29, 1949~~ JAN. 13, 1950. The second amended information is as follows:

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

The State of Kansas, Plaintiff,	)	
vs.	)	Case A-29287
LEE KAMEN, Defendant	)	Div. No. 4

SECOND AMENDED INFORMATION

COMES NOW JOHNIE FRANK, the duly elected, qualified and acting County Attorney in and for the County of Sedgwick and State of Kansas, and for and on behalf of said State, gives the court to understand and be informed that in the County of Sedgwick and State of Kansas, and on or about the 30th day of March, A. D. 1948, one LEE KAMEN did then and there unlawfully, feloniously, wilfully buy and receive personal property, to-wit: two skids of new zinc bond sheet steel, 25-gauge, weighing a total of approximately 11,000 pounds, and each skid being 9 feet long, 2 2/3 feet wide and 5 inches thick, a more particular description of which informant is not now able to give, said personal property being over the value of Twenty Dollars ($20.00), that had been stolen from another, The Coleman Company, Inc., knowing the same to have been stolen; all of said acts then and there committed being intentional, unlawful, felonious and willful and being contrary to the statutes in such cases made and provided and being against the peace and dignity of the State of Kansas.

Sec. 21-549, 1935 G. S. K.

.....
County Attorney

STATE OF KANSAS, SEDGWICK COUNTY, SS:

JOHNIE FRANK, County Attorney within and for said County and State, being by me first duly sworn, says that he has read the above and foregoing information and knows the contents thereof, and that the same is true in substance and in fact to his best information and belief.

.....
COUNTY ATTORNEY

SUBSCRIBED and sworn to before me this 2nd day of December, 1949.

.....
Clerk of the District Court

STATE WITNESSES:

J. H. Reeves, G. G. Friesen, Don Hall, Vern Miller, W. P. D.;
H. D. Burke, c/o Coleman Co., Inc.;
Arsene Easley, c/o Coleman Co., Inc.;
Floyd Quinlisk, c/o Coleman Co., Inc.;
Lewis R. Meadows, 601 N. Green;
Arnold Mark, 5605 W. Maple; Christie Higbee, 326 S. Elizabeth.
Lotus Helm, c/o The Coleman Company, Inc.;
Phyllis Leslie, c/o The Coleman Company, Inc.;
Alfred Keeler, c/o The Coleman Company, Inc.;
Carl Mercer, c/o The Coleman Company, Inc.;"

On January 16, 1950, the defendant appeared for trial in the District Court of Sedgwick County, Kansas, upon the aforesaid second amended information and after waiving arraignment and entering a plea of not guilty a jury was duly empanelled and sworn to try the cause.

The State introduced its evidence and rested and thereupon defendant moved the Court to direct the jury to

return a verdict of not guilty and to discharge the defendant for the reason that the State failed to prove the allegations alleged in said second amended information.

During the argument of said motion for a directed verdict and discharge the Court, on January 19, 1950, declared a mistrial upon no ground provided by statute nor law, discharged the jury from further consideration of the case and ordered the State to file a new and third amended information.

Thereafter and on the 3rd day of March, 1950, the State filed its third amended information, to-wit:

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

The State of Kansas, Plaintiff,)
vs.)Case No. A-29287
LEE KAMEN, Defendant.) Div. No. 4

THIRD AMENDED INFORMATION

COMES NOW JOHNIE FRANK, the duly elected, qualified and acting County Attorney in and for the County of Sedgwick and State of Kansas, and for and on behalf of said State, gives the court to understand and be informed that in the County of Sedgwick and State of Kansas, and on or about the 30th day of March, A. D. 1948, one LEE KAMEN did then and there unlawfully, feloniously, wilfully buy and receive personal property, to-wit: two skids of new zinc bond sheet steel, 25-gauge, weighing a total of approximately 11,000 pounds, and each skid being 9 feet long, 2 2/3 feet wide and 5 inches thick, said personal property being over the value of Twenty Dollars ($20.00), that had been stolen from another, The Coleman Company, Inc., knowing

the same to have been stolen; all of said acts then and there committed being intentional, unlawful, felonious and willful and being contrary to the statutes in such cases made and provided and being against the peace and dignity of the State of Kansas.

(Sec. 21-549, 1935 G. S. K.

JOHNIE FRANK
County Attorney

STATE OF KANSAS, SEDGWICK COUNTY, SS:

JOHNIE FRANK, County Attorney within and for said County and State, being by me first duly sworn, says that he has read the above and foregoing Information and knows the contents thereof, and that the same is true in substance and in fact to his best information and belief.

JOHNIE FRANK
County Attorney

SUBSCRIBED and sworn to before me this 10th day of March, 1950.

BETTY BOMAR, Deputy
Clerk of the District Court

STATE WITNESSES:

J. H. Reeves, G. G. Friesen, Don Hall, Vern Miller, Wichita Police Department;
H. D. Burke, c/o Coleman Co., Inc.;
Arsene Easley, c/o Coleman Co., Inc.;
Floyd Quinlisk, c/o Coleman Co., Inc.;
Lewis R. Meadows, 601 No. Green;
Arnold Mark, 5605 W. Maple
Christie Higbee, 326 S. Elizabeth
Lotus Helm, c/o The Coleman Company, Inc.;
Phyllis Leslie, c/o The Coleman Company, Inc.;
Alfred Keeler, c/o The Coleman Company, Inc.;

Carl Mercer, c/o The Coleman Company, Inc.;
Fern Smith, 2721 W. 3rd St., Wichita, Kansas
W. C. Coleman, c/o The Coleman Co., Inc."

To said third amended information the defendant on the 4th day of April, 1950, filed the following motion to quash and a plea in bar, to-wit:

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. A-29287
LEE KAMEN, Defendant.	)	

MOTION TO QUASH PLAINTIFF'S THIRD AMENDED INFORMATION

COMES NOW the defendant and moves the Court to quash the plaintiff's third amended information herein filed on or about the 10th day of March, 1950 for the reason that the facts stated therein do not constitute a public offense.

LEONARD LEVAND
WEISKIRCH & HOLLY
By .....
Attorneys for Defendant."

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. A-29287
LEE KAMEN, Defendant.	)	

PLEA IN BAR

COMES NOW the defendant and moves the Court to bar prosecution in the above entitled cause for the reason that he was formerly in jeopardy on the identical charge contained in the third amended information filed and now pending in this cause.

LEONARD LEVAND
WEISKIRCH & HOLLY
By .....
Attorneys for Defendant."

Said above motion to quash the third amended information and the plea in bar have not been presented to the trial court for the reason that the defendant elected to proceed in an original proceeding in habeas corpus in the Supreme Court of the State of Kansas.

Following are the pleadings filed in the Supreme Court of the State of Kansas, number 38044, in the matter of the petition of Lee Kamen for a writ of habeas corpus, petitioner vs. Robert Gray, Sheriff of Sedgwick County, Kansas, respondent, in original proceedings in habeas corpus. Said pleadings have omitted the exhibits attached thereto for the reason that the exhibits are without import herein, and the captions are likewise omitted.

"PETITION

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

TO The Honorable Supreme Court of the State of Kansas.

Your petitioner, Lee Kamen, respectfully represents and shows to the Court that he is unlawfully

deprived of his liberty by Robert Gray, Sheriff of Sedgwick County, Kansas, at the County Jail, Wichita, Kansas, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

Upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas, a preliminary hearing was had before the City Court of Wichita on May 9, 1949, and the petitioner, the defendant, was bound over for receiving stolen property. Subsequently an information was filed in the District Court of Sedgwick County, Kansas and, upon motion of the defendant, it was quashed. Then an amended information was filed and, upon motion of the defendant, it was quashed. Then, on December 23, 1949, a second amended information was filed and a motion to quash same was overruled November 29, 1949.

The second amended information charged, in substance that on or about the 30th day of March, 1948, Lee Kamen did then and there unlawfully, feloniously and wilfully buy and receive personal property, to-wit:

> Two skids of new zinc bond sheet steel, 25 gauge, weighing a total of approximately 11,000 pounds, and each skid being 9 inches long, 2 2/3 inches wide and 5 inches thick, a more particular description of which informant is not now able to give,

said personal property being over the value of Twenty Dollars ($20.00), that had been stolen from another, The Coleman Company, Inc., knowing the same to have been stolen, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Kansas. Said information was duly verified by Johnie Frank, County Attorney.

January 16, 1950 the defendant appeared for trial in the District Court of Sedgwick County, Kansas, before the Honorable Ross McCormick, Judge. After waiving arraignment and entering a plea of not guilty, a jury was duly impanelled and sworn to try the cause. The plaintiff introduced its evidence and rested and thereupon defendant moved the Court to direct the jury to return a verdict of not guilty and to discharge the defendant for the reason that the State failed to prove the allegations and averments alleged in the second amended information filed in this cause.

During the argument of said motion for a directed verdict and discharge, the Court, on January 19, 1950, declared a mistrial, discharged the jury and required the State to file a new information.

The Court, when being requested to make a record of the grounds upon which the mistrial was declared, stated:

> "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 and there are some details of the defendant's complaint that are substantial. In the first place it was prompted by the defense itself in asking the policeman to go down and get his report and then he was examined when he returned and these is remarks about the policeman's testimony and character. Then was the evidence of an altered instrument and it hints at perjured evidence and taking it all and all it is a question of whether it is justice or not and, for that reason I am granting a mistrial and ordering a new information be filed and the case will be tried in the April Term. So get ready for the April Term of Court.
>
> Bring down the jury.
>
> (Jury brought into court at 10:35 A. M.)

THE COURT: Good morning, ladies and gentlemen of the jury. I have relieved you all of a big headache, I am granting a new trial in this case, I am declaring a mistrial because of errors which have come into the record before you and I don't want you passing on the merits of the case, so, I am not sending it to you as a jury, I am discharging you from further attendance on the trial of this case, but don't talk to anybody about this case because it is not finished as yet and don't allow anybody to pry out of you any informaton about this case. You man now return to your general jury room." (T-69-70)

The State rested its case Wednesday evening, January 18, 1950 and after the motion for a directed verdict and for discharge was interposed on the morning of Thursday, January 19, 1950, the Court made other statements that, for the purpose of the record, are included, to-wit:

"THE COURT: Plenty of evidence went to the jury which was incompetent from both sides, on cross examination and on direct examination. And I will repeat, since the reporter is taking it down, Mistakes were made on both sides, by the State's and by the Defendant's attorney. In the first place the State's attorneys made a mistake in allowing this matter to drag on two years. You can't do that and the same rule applies to both sides. You cannot delay and then benefit by the delay. So, I have really come to the conclusion of what ought to be done in this case and I am about to state it. Here we have eminent citizens of this State on both sides. And, if a trial is to be had and if a conviction is to be had it ought to be right. I am declaring a mistrial and that ends the trial of this case. Now, then, but

I am also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection." (T-68-69)

Subsequent to the Court declaring a mistrial, the defendant surrendered himself to the Sheriff of Sedgwick County, Kansas, where he is now in custody.

Upon the allegations hereinabove set forth, the Court, in declaring a mistrial, acquitted the defendant as a matter of law, hence the defendant is being unlawfully deprived of his liberty in violation of:

1. The Fifth Amendment to the Constitution of the United States;
2. The Fourteenth Amendment to the Constitution of the United States;
3. Section 10 of the Bill of Rights;
4. In violation of the laws of the State of Kansas.

Under the laws of the State of Kansas, when a trial has been commenced before a Court of competent jurisdiction, upon an information sufficient to sustain a conviction, and jeopardy has attached and there has been a discontinuance of the trial without the consent of the accused or an absolute necessity or for any reason other than one provided in Section 60-2914 of the General Statutes of 1935, the defendant cannot again be placed in jeopardy and tried upon the same information for the same offense.

WHEREFORE your petitioner prays that a writ of habeas corpus may be issued and that he may be discharged from his unlawful imprisonment.

WEISKIRCH & HOLLY
By .....
Attorneys for Petitioner."

"ANSWER AND RETURN OF RESPONDENT

Comes now the above named respondent and for his answer and return to the petition for writ of habeas corpus filed herein, alleges and states:

I.

That except as may be hereinafter explained or admitted, respondent specifically denies each and every, all and singular, the allegations, statements and averments contained in said petition for a writ of habeas corpus.

II.

That petitioner on May 9, 1949, was bound over for trial on the charge of receiving stolen property, contrary to G.S.K. 1935 21-549, after a preliminary hearing was had upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas; that on December 23, 1949, a second amended information was filed in said cause, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof by reference the same as if fully set out herein.

That the petitioner waived arraignment on said second amended information, entered a plea of not guilty and appeared for trial in the District Court of Sedgwick County, Kansas, Division 1; that a jury was duly impaneled and sworn to try the cause. The plaintiff (State) introduced its evidence and at the close of the plaintiff's evidence, the defendant (petitioner), by his attorney, A. D. Weiskirch, moved and asked the Court to declare a mistrial of the case.

That immediately thereafter the State rested its case and the defendant (petitioner) moved the Court

to direct the jury to return a verdict of not guilty and to discharge the defendant, on the grounds that the State failed to prove the allegations and averments alleged in the second amended information filed in said case.

That during the argument of said motion for a directed verdict and on January 19, 1950, the defendant, by A. D. Weiskirch, his attorney, again asked the Court to declare a mistrial of said case.

That on January 19, 1950, the Court declared a mistrial and ordered the State to file a new information and thereafter asked if the defense had any objection; that the defense made no objection and the defendant, by his attorney, A. D. Weiskirch, consented to the ruling by stating, "We will even assist them, if they want us to, in the description of the property."

That thereafter on the 10th day of March, 1950, a new information was filed in said cause, a copy of which is hereto attached, marked Exhibit "B", and made a part hereof by reference the same as if fully set out herein.

That the action of the Court in declaring a mistrial was based upon the motions of the petitioner and was done with his consent and upon his special instance and request.

III.

That the petitioner is duly and legally confined in the custody of the respondent under the warrant heretofore issued in said cause, a copy of which is hereto attached, marked Exhibit "C", and made a part hereof by reference the same as if fully set out herein, and that petitioner was granted a mistrial at his own instigation, request and instance and by his own consent, and that petitioner is not

entitled in law or in fact to a writ of habeas corpus in this proceeding.

WHEREFORE, respondent prays that a writ of habeas corpus be not issued in this proceeding, and that the same be dismissed.

HAROLD R. FATZER,
Attorney General.
C. HAROLD HUGHES,
Assistant Attorney General.
JOHNIE FRANK,
County Attorney,
Sedgwick County, Kansas.
A. MARTIN MILLARD,
Deputy County Attorney,
Sedgwick County, Kansas.
EUGENE COOMBS,
Special Prosecutor."

"REPLY TO ANSWER AND RETURN OF RESPONDENT

COMES NOW the petitioner, Lee Kamen, and in reply to the answer and return of respondent, Robert Gray, Sheriff of Sedgwick County, Kansas, states and alleges:

I.

Petitioner denies each and every, all and singular, the allegations, averments and statements set forth in respondent's answer and return except such allegations, averments and statements as are hereinafter admitted.

II.

Petitioner admits that on May 9, 1949 he was bound over for trial on the charge of receiving stolen property contrary to G. S. 1935, 21-549 after

a preliminary hearing was had upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas. That on December 23, 1949, a second amended information was filed in said cause, a copy of which is attached as Exhibit "A" to respondent's answer and return. That petitioner waived arraignment on the second amended information, entered a plea of not guilty and appeared for trial in the District Court of Sedgwick County, Kansas, in Division one thereof; that a jury was duly empanelled and sworn to try the cause; that the State introduced its evidence and during the introduction thereof petitioner moved the Court to declare a mistrial. That thereafter and on January 18, 1950 the State did rest and petitioner moved the Court to direct the jury to return a verdict of not guilty and to discharge the defendant on the ground that the State failed to prove the allegations and averments alleged in the second amended information filed in the cause. That on January 19, 1950 the Court declared a mistrial and ordered the State to file a new information. That subsequently and on March 10, 1950 the State filed its new information, a copy of which, marked Exhibit "B", is attached to respondent's answer and return. That the petitioner was confined in the custody of the respondent under a warrant, a copy of which is marked Exhibit "C" and is made a part of respondent's answer and return.

III.

Further replying, petitioner specifically denies that the petitioner moved the Court to declare a mistrial at the close of the plaintiff's case, but alleges that petitioner moved the Court to declare a mistrial before the State rested and said motion was thereupon by the Court overruled, as indicated by the transcript of the record made in this cause.

IV.

Further replying the petitioner informs the Court that the transcript of the record does not disclose that during the argument of petitioner's motion for a directed verdict and on January 19, 1950 the defendant, by his attorney, again asked the Court to declare a mistrial as alleged in the 4th subsection of paragraph II of the respondent's answer and return.

V.

Petitioner specifically denies the allegation, to-wit:

> "That on January 19, 1950, the Court declared a mistrial and ordered the State to file a new information and thereafter asked if the defense had any objection; that the defense made no objection and the defendant, by his attorney, A. D. Weiskirch, consented to the ruling by stating, 'We will even assist them, if they want us to, in the description of the property.' "

set forth in sub-paragraph five of paragraph II of respondent's answer and return and informs the Court that the transcript of the record discloses that on January 19, 1950 the Court, after some colloquy, stated:

> "I am declaring a mistrial and that ends the trial of this case."

After the above quoted declaration by the Court, the Court then said:

> "Now, then, but I am also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection?"

It was at this point that counsel for the defendant said:

> "We will even assist them if they want us to in the description of the property."

and petitioner informs the Court that said remark of counsel referred solely and only to the Court's remark requiring a new information to be filed.

VI.

Petitioner further replying affirmatively informs the Court that the trial Court did not declare a mistrial upon motion of the petitioner but, as indicated by the transcript of the record, declared a mistrial upon the grounds hereinafter set forth in the record, to-wit:

"MR. COOMBS: On what ground is a mistrial being declared?

THE COURT: Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 and there are some details of the defendant's complaint that are substantial. In the first place it was prompted by the defense itself in asking the policeman to go down and get his report and then he was examined when he returned and these is remarks about the policeman's testimony and character. Then was the evidence of an altered instrument and it hints at perjured evidence and taking it all and all it is a question of whether it is justice or not and, for that reason I am granting a mistrial and ordering a new information be filed and the case will be tried in the April Term. So get ready for the April Term of Court.

Bring down the jury."

WHEREFORE, petitioner prays for relief as heretofore prayed for in his petition.

LEONARD LEVAND
WEISKIRCH & HOLLY
By .....
Attorneys for Petitioner

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

I, LEE KAMEN, do solemnly swear:

That I am the petitioner above named; that I have read the above and foregoing Reply to the Respondent's Answer and Return; that I know the contents thereof and that the same is true and correct.

.....
LEE KAMEN

SUBSCRIBED and sworn to before me this ..... day of March, 1950.

.....
Notary Public

My Commission Expires:
.....

After briefing and orally arguing the matter in the Supreme Court of the State of Kansas, the Court, in a divided opinion, denied the defendant's petition for writ of habeas corpus July 8, 1950, in the following opinion:

"No. 38,044

In the Matter of the Petition of LEE KAMEN, for a Writ of Habeas Corpus, *Petitioner,*

v.

Robert Gray, Sheriff of Sedgwick County, Kansas, *Respondent.*

SYLLABUS BY THE COURT

Petitioner was charged with receiving stolen property. In the trial in the district court, after a jury had been empanelled and sworn and evidence of the state was introduced, the defendant moved the Court

to declare a mistrial because of error and prejudice engendered in the minds of the jury by the admission of certain specified evidence, which motion was overruled. The state then rested its case, and defendant moved the court for a directed verdict of not guilty for the reason that the state had failed to prove the allegations of the information. After some argument on the latter motion, the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial. On habeas corpus proceedings in this court, it is held: Defendant cannot thereafter plead former jeopardy when placed on trial on an amended information for the same offense, having requested and consented, by his former action, to waiver of his constitutional privilege.

Original proceedings in habeas corpus. Opinion filed July 8, 1950. Writ denied.

A. D. Weiskirch, of Wichita, argued the cause, and *Manford Holly, William C. Farmer* and *Leonard Levand,* also of Wichita, were with him on the briefs for the petitioner.

Eugene G. Coombs, of Wichita, argued the cause, and *Harold R. Fatzer,* attorney general, *C. Harold Hughes,* assistant attorney general, *Johnie Frank,* County Attorney, and *A. Martin Millard,* deputy county attorney, were with him on the briefs for the respondent.

The opinion of the court was delivered by

WERTZ, J.: This is an original proceeding in habeas corpus. Lee Kamen, petitioner, seeks to be discharged from the custody of respondent sheriff, by whom he is detained awaiting trial on a criminal charge. He claims that his imprisonment is unlawful and that he is being deprived of his liberty in violation of federal and state constitutions and laws.

The following proceedings were had in the district court of Sedgwick county, prior to institution of these proceedings in habeas corpus. Petitioner, defendant below, was—after a preliminary hearing before the city court of Wichita on May 9, 1949—On January 16, 1950, placed on trial before a jury in the district court of Sedgwick County on a charge of receiving stolen property, having waived arraignment and pleaded not guilty. The state introduced evidence of seven witnesses—the seventh being Detective Reeves of the police department—concerning a police report and alleged changes in the report, which report was offered in evidence and, over defendant's objections, admitted and read to the jury. Defendant again objected to admission of said report and asked the court to declare a mistrial because of prejudice to defendant by its erroneous admission, but was overruled by the court. The state then rested its case and the court called for introduction of the case for the defense, whereupon counsel for the defense asked that the jury be excused while he argued some motions to the court. Before the jury was excused, counsel for the state explained for the record and to the jury the purpose for which the police report in controversy was offered in evidence. The jury having been excused, counsel for defendant moved for a directed verdict of not guilty and discharge of defendant for the reason the state had failed to prove the allegations and averments alleged in the second amended information, which motion was argued by counsel and taken under advisement by the court. Court was recessed, and on re-convening, argument on the motion to dismiss continued for some time, whereupon the court on its own motion ruled that "I am declaring a mistrial, and that ends the trial of this case . . . I . . . will require a new information totally . . . If the defense has any objections?"

Defense Counsel: "We will even assist them, if they want us to, in the description of the property."

On inquiry by counsel for the State as to grounds for the declaration of a mistrial, the court said "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 (the police report) and there are some details of the defendant's complaint that are substantial."

On March 10, 1950, the state filed a third amended information to which defendant, petitioner herein, filed a motion to quash and a plea in bar on the premise that he cannot be twice put in jeopardy for the same offense. Said motions are pending, dependent upon the outcome of this habeas corpus proceeding.

The question to be determined here is whether defendant was placed in jeopardy in the proceeding before the district court resulting in declaration of a mistrial by the court so as to preclude trial in that court on the third amended information. The contention of the state is that defendant cannot now complain of the court's ruling (declaration of the mistrial) because of his own motion for a mistrial, eventually sustained and resulting in discharge of the jury, and also because defendant failed to object to such ruling and in fact stated "We will even assist them, if they want us to, in the description of the property"; that the relief sought (discharge in habeas corpus) is therefore not available when petitioner's cause is still pending in the lower court. Petitioner, on the other hand, argues that his motion for a mistrial was overruled and no longer before the court and no further motion for declaration of a mistrial in the case was interposed by him; that the defendant was placed in jeopardy when charged with commission of the crime, brought to trial, the jury empanelled and sworn to try the

cause, and trial begun before a court of competent jurisdiction upon an information sufficient to sustain a conviction.

G. S. 1935, 60-2914 provides:

> "The jury may be discharged by the Court on account of the sickness of a juror, or other accident or calamity, or other necessity to be found by the court requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

Petitioner contends that the court cannot arbitrarily discharge the jury before a verdict is returned and a discharge in such case, unless for an absolute necessity or for a reason provided by statute, will operate as an acquittal providing defendant has not waived his right to claim double jeopardy and has not joined the state in requesting a mistrial.

It is true that the discharge of a jury after the trial has begun without an overruling necessity or without the consent of the defendant will ordinarily operate as a bar to further prosecution (*State v. McKinney,* 76 Kan. 419, 91 Pac. 1068; *In re Rockwood,* 146 Kan. 386, 69 P. 2d 703, and cases cited therein.) However, the record in the instant case discloses that the defendant requested the court to order a mistrial. After Exhibit 12 had been offered and received in evidence, the defendant interposed an objection the pertinent part of which reads:

> " . . . We now ask the Court to declare a mistrial of this case on account of the error and prejudice that has been engendered in the minds of the jury by the reading of the report of this case by the detective and police officers, . . . for

the reason it is wholly incompetent . . . and it contains hearsay of the rankest sort . . . all of which is highly prejudicial and altogether incompetent, and we ask that you declare a mistrial at this time."

During the argument of defendant's motion for a directed verdict of not guilty, the court stated: "I am declaring a mistrial, and that ends the trial of this case." When questioned by counsel for the state as to the reason for the court's ruling, the court stated among other things: "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 . . . "

It will be noted that the reason given by the court was the basis of the defendant's earlier request for a mistrial. It is well settled that if a jury is discharged at the instance of a defendant himself, he cannot set up the fact as a bar to a subsequent prosecution. (*State v. McKinney,* supra; *State v. Arnold,* 142 Kan. 589, 50 F. 2d 1008). Defendant argues that the court had previously overruled his request for a mistrial and no further request was made by him or the state and that his motion for a directed verdict of not guilty was pending before the court. His former objection to proceeding further in the case on account of the error and prejudice engendered in the minds of the jury by the reading of the police report was the very ground on which the court based his later declaration of a mistrial. The discharge of the jury was the necessary result of sustaining defendant's request and he has no right to complain that the court took the action which he had requested and to which no objection was made; his actions amounted to a consent.

The above rule was followed in the case of *State v. Arnold,* supra, in which the defendant was charged

under a forgery statute. Defendant was tried and at the close of the state's evidence moved for a directed verdict of not guilty because the state had failed to prove an offense charged or any offense. The court overruled that motion but sustained an earlier motion of the defendant on the ground of variance between the information and proof. Defendant was rearrested, tried under another forgery statute, and convicted. Before the second trial, the defendant filed a special plea in bar on the ground of former jeopardy. The court pointed out that an inconclusive result in the former trial had been reached (at the instance of the defendant) and said:

"It is finally contended that defendant's special plea in bar on the ground of former jeopardy should have been sustained. This plea is not available when an inconclusive result had been reached in a former criminal trial at the instigation of the defendant himself. *State v. McKinney,* 76 Kan. 419, 420, 91 Pac. 1068; *State v. Reynolds,* 140 Kan. 269, 36 P. 2d. 323, and citations; 16 C. J. 254, and note in 135 A. S. R. 70-73". (P. 594)

Defendant relies principally on the case of *State v. Stiff,* 117 Kan. 243, 234 Pac. 700, rehearing 118 Kan. 208. We do not believe this case is controlling under the facts in the instant case. In the Stiff case, Stiff filed a motion to quash the information before he had entered his plea of not guilty and before the jury had been sworn to try the case. At this point, jeopardy had not attached. His motion was overruled, the jury was sworn, and the state made a request to amend the information, which request was denied by the court, and the court thereupon sustained the motion to quash the information which previously had been overruled, as stated. This court held the jury was discharged

without the request or consent of defendant Stiff and he could not thereafter be tried. We distinguished the Stiff case in the case of *State v. Reynolds,* 140 Kan. 269, 36 P. 2d 323. Reynolds claimed he was in former jeopardy in a case where, after the jury was empanelled and sworn, he objected to the introduction of evidence for the reason the information failed to charge a public offense. The court sustained his objection and discharged defendant and jury. Defendant Reynolds claimed this was without his consent and relied upon the authority of *State v. Stiff,* supra. The court stated:

> "The facts on which this opinion (Stiff case) was based are very different indeed from those in the case at bar. In the latter we have the defendant objecting to the introduction of evidence after having been put in jeopardy, and his attorney pointing out the insufficiencies of the information, which go far towards making it invalid and such as might not sufficiently charge an offense as to sustain a judgment on a verdict of guilty. We also have the trial court sustaining the defendant's objection to the introduction of evidence, which of necessity disposes of the first case at the request and insistence of the defendant, instead of overuling the defendant's motion to quash, as in the Stiff case, and later reversing that ruling without any request from the defendant.
>
> . . . . . .
>
> "Appellant cites authorities to the effect that mere silence of the defendant, or his failure to object or protest against the discharge of the jury, does not constitute a consent to such discharge of the jury or in any way waive his constitutional rights against being subjected to a second jeopardy. To this we fully agree, but we can

readily see a distinction between such conduct and the active pressing of an objection the sustaining of which will produce the same result."

It is our conclusion that the petitioner by his request for the court to declare a mistrial waived his constitutional right of jeopardy if such existed after the jury was empanelled and sworn.

The state contends that habeas corpus did not lie in this case for the reason that the petitioner's cause is still pending and undetermined in the lower court. However, this court held many years ago that if the petitioner was entitled to his discharge in the district court, he ought to be released in his proceeding by habeas corpus, as that proceeding is the only one which affords him a speedy remedy. If his only remedy is by appeal, he must continue wrongfully restrained of his liberty until the case is finally determined by the district court, as an appeal can be taken by the defendant only after judgment. It would be a palpable violation of the bill of rights, and also of the statute, to require an accused who is entitled to his discharge, so far as relates to the offense for which he was committed, to be restrained of his liberty indefinitely at the instance of the state, or upon the order of the court, to await a final trial, or determination of the case against him. (*In re McMicken*, 39 Kan. 406, 409, 18 Pac. 473; *In re Lewis*, 152 Kan. 193, 102 P. 2d 981)

In view of what has been said, the writ will be denied.

SMITH, J. (dissenting): I dissent from all portions of the majority opinion except those holdings that habeas corpus is a proper remedy in the instant case. The sufficiency of the amended information upon which defendant was tried is not questioned.

A jury was duly empanelled and sworn to try the case, and after introduction of the state's evidence, defendant moved for a mistrial, which motion was by the court overruled. Thereafter the state rested its case. Defendant then interposed his motion for a directed verdict of not guilty and discharge. During argument on the latter motion, the court for reasons not provided by statute and on its own motion, without any request by either defendant or the state, declared a mistrial. Defendant's former motion for a mistrial had been overruled previously and was no longer before the court. Defendant did not object to the court's ruling. However, the state requested that the court make a record of its reasons for declaring a mistrial and no statutory reason was given by the court for its action.

When a defendant has been placed upon trial on a criminal charge, the jury is empanelled and sworn before a court of competent jurisdiction, and defendant is tried upon a sufficient information, the court cannot arbitrarily discharge the jury before a verdict is returned, and a discharge in such case, unless an absolute necessity or for a reason provided by statute, will operate as an acquittal providing, of course, that the defendant has not waived his right to claim double jeopardy and has not joined the state in requesting a mistrial. (*State v. Smith,* 44 Kan. 75, 24 Pac. 84; *State v. Reed,* 53 Kan. 767, 37 Pac. 174; *State v. Allen,* 59 Kan. 758, 54 Pac. 1062; *State v. Klauer,* 70 Kan. 384, 78 Pac. 802; *State v. Stiff,* 118 Kan. 208, 234 Pac. 700; *In re Rockwood,* 146 Kan. 386, 69 P. 2d 703). It is observed from the above decisions that the power to discharge a jury cannot be exercised arbitrarily by the court.

The majority opinion states that the remark made by defense counsel to the effect that "we will even

assist them, if they want us to, in the description of the property", constituted a waiver of jeopardy. In my opinion that statement was made in response to the court's statement just prior thereto requiring the state to file a new information, and cannot be considered as referring to an earlier statement by the court as to its action in declaring a mistrial.

The constitutional right of a party charged with a crime is that he is not to be twice put in jeopardy for the same offense, and the power of a court to discharge a jury which has been sworn to pass upon the question of his guilt or innocence must be exercised with the view of preserving inviolate his constitutional rights.

I am of the opinion that the writ should be granted.

PARKER and WERTZ, JJ., join in the foregoing dissenting opinion."

Thereafter the defendant filed his motion for rehearing which was likewise, by the Supreme Court of the State of Kansas, denied on August 3, 1950, and in its denial the Supreme Court handed down no written opinion.

The matter involved in this case is the right of a State Court to cause a defendant for the same offense to be twice put in jeopardy of life and limb in disregard of federal rights guaranteed unto him by virtue of the Fifth Amendment to the Constitution of the United States and State rights guaranteed unto him by virtue of Section 10 of the Bill of Rights of the Constitution of the State of Kansas.

THIS COURT HAS JURISDICTION.

By virtue of the federal rules of the United States Supreme Court, Rules 36, 38, 38½, 28 U. S. C. 2101 (c), which provide, in substance, that where a state court has decided a cause in a way probably not in accord with applicable decisions of the federal and state courts, pertaining to rights of liberty guaranted under the federal and state Constitutions, that this court has jurisdiction to review the state court decision through writ of certiorari.

QUESTION PRESENTED.

When a defendant has been placed upon trial on a criminal charge in a court of competent jurisdiction, upon an information which is sufficient to sustain a conviction, before a jury duly empanelled and sworn to try the cause and the state has introduced its evidence and rested and the defendant then moves for his discharge and a directed verdict and the court, in lieu of ruling thereon, declares a mistrial, discharges the jury upon purported trial errors and not at the request of the defendant nor as provided by law, and orders a new amended information filed, is it a bar to a further prosecution of the defendant for the same offense a second time under the rights and immunities afforded a defendant under the Fifth Amendment to the Constitution of the United States and the Bill of Rights of the State of Kansas?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. As a matter of law, the defendant was acquitted when the trial court declared a mistrial upon a ground not provided by law after jeopardy had attached.

2. The defendant is being deprived of his liberty in violation of the Fifth Amendment to the Constitution of the United States and the Bill of Rights of the State of Kansas, in that he is being subjected for the same offense to be twice put in jeopardy of life or limb.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Kansas commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of Kansas, had in the case numbered and docketed number 38044 in the matter of the petition of Lee Kamen for a writ of habeas corpus, petitioner, vs. Robert Gray, Sheriff of Sedgwick County, Kansas, respondent, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States and that the judgment herein of said Supreme Court of the State of Kansas be reversed by this Court, and for such further relief that to the Court seems proper.

DATED August 30th, 1950.

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER,
LEONARD LEVAND,
all of Wichita, Kansas,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1950

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

v.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

To the Honorable Fred M. Vincent, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The majority opinion and dissenting opinion in the Supreme Court of the State of Kansas is reported in advance sheets of the Kansas Reports, Volume 169, Number 4, and is set forth verbatim heretofore in defendant's petition for writ of certiorari, supra, pages 20-29.

JURISDICTION.

1. The date of the judgment wherein the Supreme Court of the State of Kansas denied defendant's petition for writ of habeas corpus was filed July 8, 1950.

2. On August 3, 1950, the Supreme Court of the State of Kansas denied petitioner's motion for rehearing in the above matter.

3. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. 2101 (c) which provides that where a state court has decided a cause in a way probably not in accord with applicable decisions of the federal and state courts, this Court has jurisdiction to review the state court decisions through writ of certiorari. Further, under said statute, this court has jurisdiction to review a state court decision where a defendant is deprived of his liberty without due process of law and is subjected for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE.

A statement of the case has been made in the preceding petition on page 2, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERROR.

The Supreme Court of the State of Kansas erred in denying petitioner's petition for a writ of habeas corpus in case numbered 38044 in the Supreme Court of the State of Kansas, in case styled Lee Kamen, petitioner, v. Robert Gray, Sheriff of Sedgwick County, Kansas, respondent, original proceedings in habeas corpus.

ARGUMENT.

SUMMARY:

Point One: As heretofore indicated by the pleadings in the habeas corpus proceeding in the Supreme Court and the record made of the trial of the defendant before the trial court, the defendant, during the progress of his felony trial, on the charge of receiving stolen property knowing it to have been so stolen, as charged in the second amended information hereinbefore set forth, moved the court, after the state rested, for a directed verdict and his discharge upon the ground that the state failed to prove the allegations in said second amended information and the trial court, in lieu of ruling thereon, discharged the jury without a necessity and without a reason provided by statute. Also the court at that time ordered a new and third amended information filed. In compliance therewith, the state filed a third amended information, setting forth the identical charge theretofore made in the second amended information and is now attempting to again prosecute the defendant for the same crime a second time. To the third amended information, there has been filed a plea in bar and a motion to quash, but rulings thereon are held in abeyance pending the outcome of this proceeding.

It is contended by the defense that the Court, in declaring a mistrial in the manner he did, acquitted the defendant of the charge preferred in the second amended information and therefore he cannot again be placed in jeopardy for the same offense and be tried upon the third amended information.

By reason of certain trial matters hereinafter appearing, the state is contending that the right to claim double jeopardy has been waived and since the majority of the Supreme Court of the State of Kansas upheld the state's contention that the defendant had waived his right to claim double jeopardy, the matter will be argued hereinafter in the converse, namely (1) the defendant did not, by his acts, waive his right to claim double jeopardy, and (2) as a matter of law he was acquitted by the trial court's declaration of a mistrial in the manner and at the juncture it was declared.

The pertinent statute of the State of Kansas is G. S. 1935, 60-2914, as follows:

> "The jury may be discharged by the Court on account of sickness of a juror, or other accident or calamity, or other necessity to be found by the Court requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

The record made by the trial court, at the time the jury was discharged and the court ordered the filing of a new and amended third information follows:

> "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 and there are some details of the defendant's complaint that are substantial. In the first place it was prompted by the defense itself in asking the policeman to go down and get his report and then he was examined when he returned and these *is* remarks about the policeman's testimony and character. *Then* was the evidence of an altered instrument and it hints at perjured evidence and taking it all and all it is a

question of whether it is justice or not and, for that reason I am granting a mistrial and ordering a new information be filed and the case will be tried in the April Term. So get ready for the April Term of Court.

Bring down the jury.

(Jury brought into court at 10:35 A. M.)

THE COURT: Good morning, ladies and gentlemen of the jury. I have relieved you all of a big headache, I am granting a new trial in this case, I am declaring a mistrial because of errors which have come into the record before you and I don't want you passing on the merits of the case, so, I am not sending it to you as a jury, I am discharging you from further attendance on the trial of this case, but don't talk to anybody about this case because it is not finished as yet and don't allow anybody to pry out of you any information about this case. You may now return to your general jury room." (T. 69-70)

"THE COURT: Plenty of evidence went to the jury which was incompetent from both sides, on cross examination and on direct examination. And I will repeat, since the reporter is taking it down, mistakes were made on both sides, by the State's and by the defendant's attorney. In the first place the State's attorneys made a mistake in allowing this matter to drag on two years. You can't do that and the same rule applies to both sides. You cannot delay and then benefit by the delay. So, I have really come to the conclusion of what ought to be done in this case and I am about to state it. Here we have eminent citizens of this State on both sides. And, if a trial is to be had and if a conviction is to be had it ought to be right. I am declaring a mistrial and that ends the trial of this case. Now, then, but I am

also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection." (T. 68-69)

In answer to the court's query, and after the court had declared the mistrial, counsel for the defendant stated:

"We will even assist them if they want us to in the description of the property."

It was contended in the Supreme Court that the defendant waived his right to claim double jeopardy by having moved, during the progress of the trial and during the State's case in chief, that the court declared a mistrial upon the ground that hearsay evidence in the nature of a police report was erroneously offered and admitted in evidence, and the Supreme Court, in upholding said waiver, as indicated by the syllabus, justified said contention upon the premise that the court, on its own motion, reversed its former ruling wherein it denied defendant's motion to declare a mistrial and declared a mistrial on the ground set forth in the defendant's original motion for a declaration of mistrial.

In connection with the above, we specifically call to this court's attention the applicable portion of the sylabus in the Kansas Supreme Court's opinion which, to the writer, appears to contain a mis-statement of facts. The applicable portion of the syllabus is:

"Criminal Law—Mistrial—Former Jeopardy. Petitioner was charged with receiving stolen property. In the trial *is* the district court, after a jury had been empanelled and sworn and evidence of the state was introduced, the defendant moved the court to

declare a mistrial because of error and prejudice engendered in the minds of the jury by the admission of certain specified evidence, which motion was overruled. The state then rested its case, and defendant moved the court for a directed verdict of not guilty for the reason that the state had failed to prove the allegations in the information. *After some argument on the latter motion, the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial.* . . . " (Emphasis supplied.)

The mis-statement of fact is apparent in that the record does not disclose that the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial. The record does clearly set forth (T. 61) that the defendant objected to Exhibit 12, being the police officer's report, on the ground it was incompetent, irrelevant and immaterial and contained hearsay evidence and when the objection was interposed, *the court overruled defendant's motion to declrae a mistrial.* (T. 62) At no place does the record disclose that the court went back and reversed its ruling and it should be borne in mind that the state had rested before the court, on its own motion, declared a mistrial upon the grounds heretofore quoted. Further, the court, at the time of declaring the mistrial, which was after the state had rested, ordered the state to file a new and amended third information.

Our Supreme Court of Kansas had previously held that after jeopardy has attached it cannot be avoided

by the court going back to a motion which had been presented in the case in chief and had been denied and then the court sustaining the motion and discharging the jury. State v. Stiff, 117 Kan. 243, 234 P. 700; rehearing 118 Kan. 208.

In the Stiff case, supra, 118 Kan. 208, on rehearing, Stiff filed a motion to quash the information before he had entered his plea of not guilty and before the jury had been sworn to try the case. His motion was overruled. The jury was then duly empanelled and sworn to try the case and the State made a request to amend the information, which request was denied by the court. Later the court sustained the motion to quash the information which previously had been overruled and the Supreme Court of Kansas held the jury was discharged without the request or consent of the defendant Stiff and he could not thereafter be tried.

In the instant case, we have more or less a synonymous situation in that before trial the trial court overruled the defendant's motion to quash the second amended information upon which the defendant was tried. The jury was then empanelled and sworn to try the cause. The state introduced its evidence and during the introduction thereof defendant moved the court to declare a mistrial because of erroneously admitted evidence. The court overruled said motion. The state then rested its case and the defendant moved for a directed verdict and his discharge upon the grounds that the state had failed to prove its case. In lieu of ruling upon said motion for discharge, the court, *on its own motion and*

without reversing its former order denying a mistrial, granted a mistrial upon reasons that cannot be assigned as an absolute necessity nor upon any ground provided by statute. Simultaneously the court ordered the filing of a new amended third information, which brings the instant case directly in point with the Stiff case, supra.

It was further contended in the Supreme Court that the defendant, through his counsel, waived his right to claim double jeopardy when the court queried if there was any objection to the state filing a new and third amended information and counsel responded he would assist the state in the description of the property. In answer to the above, we call to the court's attention that the rule is well settled that no such statement by counsel could amount to a waiver of his client's constitutional right to claim double jeopardy in the absence of express authority on the part of the accused. The law seems to be that in the absence of express authority, an attorney has no power to surrender substantial legal rights of his client. 7 C. J. S., Attorney and Client, par. 100 C, page 922. Since there was no such assent given, the remark was ineffective as a waiver of the defendant's right to claim double jeopardy. To hold that the defendant acquiesced in the discharge of the jury through such a remark of counsel would be to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused. Lasser v. U. S., 315 U. S. 60, 72, 62 S. C. 457, 465, 86 L. Ed. 680. On the trial of a person charged with a felony, courts should not hold that constitutional

rights are waived unless the defendant directly waives them or requests or consents to some action that in itself amounts to a waiver. Courts should not hold that such rights are waived by silence. 16 C. J. 254, State v. Stiff, 118 Kan. 208.

It is conceded, for the sake of argument, that the right or immunity against being placed twice in jeopardy for the same offense is a personal right and individual privilege and it may be waived by the accused either expressly or impliedly. State v. Reynolds, 140 Kan. 269, 36 P. 2d 323; Brady v. U. S., 24 F. 2d 397, Cert. denied 278 U. S. 603, 49 S. C. 10, 73 L. Ed. 531. But, on the other hand, whether a waiver has occurred depends upon the circumstances of each case and without question a waiver involves the intentional relinquishment or abandonment of a known right or privilege. Further, a strong presumption is raised against the waiver of fundamental rights by an accused as his constitutional rights are jealously guarded. Johnson v. Zerbst, 304 U. S. 458, 464, 58 S. C. 1019, 82 L. Ed. 1461; Glasser v. U. S., 315 U. S. 60, 70, 62 S. C. 457, 86 L. Ed. 680; Von Moltke v. Gillies, 332 U. S. 708, 723, 68 S. C. 316, 92 L. Ed. 309; McCrea v. Jackson, 6 Cir. 148 F. 2d 193, 197; Himmelfarf v. U. S., 9th Cir., 175 F. 2d 924, 931.

In the instant case when the court declared a mistrial, the accused was silent, when the court ordered the state to file a new and amended third information, the defendant was silent, and after the court ordered the filing of the new information and asked counsel for the defendant if there was any objection and counsel

stated he would even assist the state in a correct description of the property, again the accused was silent and it seems to be definitely settled that mere silence of an accused or his failure to object or protest to a discharge of the jury cannot amount to a waiver of his right to claim double jeopardy. State v. Stiff, 118 Kan. 208, 209; 16 C. J. 254.

Certainly it would be a harsh rule to hold that a defendant consented to a withdrawal of a case from a jury simply because he interposed no objection, and there must be more than mere silence to overcome a presumption. 47 S. C. 166; 25 S. E. 220, 222, 35 L. R. A. 238.

It is the conclusion of the defendant that as a matter of law the defendant was acquitted when the trial court declared a mistrial upon a ground not provided by statute and without an absolute necessity after jeopardy had attached.

In support of the above contention, it has been held in Kansas that when a defendant has been placed upon trial on a criminal charge, a jury has been impanelled and sworn before a court of competent jurisdiction and the defendant has been tried upon a sufficient information, the Court cannot arbitrarily discharge the jury before a verdict is returned, and a discharge in such case, unless an absolute necessity or for a reason provided by statute, will operate as an acquittal providing the defendant has not waived his right to claim double jeopardy and has not joined the State in requesting a mistrial. State v. Smith, 44 Kan. 75, 24 P. 84; State v. Reed, 53 Kan. 767, 37 P. 174; State v. Allen, 59 Kan.

758, 54 P. 1060; State v. Klauer, 70 Kan. 384, 78 P. 802; State v. Stiff, 118 Kan. 208, 234 P. 700; in re Rockwood, 146 Kan. 386, 69 P. 2d 703.

In further support of the contention of law advanced in this case, we urge that the record made by the trial court at the time it declared a mistrial speaks for itself. The reasons that were assigned therein are numerous and it is apparent that a mistrial was not an absolute necessity, as trial errors could have been cured by an instruction to the jury to disregard erroneously admitted evidence and it is apparent that no statutory reason was assigned for declaring a mistrial. Further, the court's record claerly shows that the discharge of the jury before the completion of the trial was not only without the consent of the accused but was without sufficient statutory reason and same bars a further trial under the laws of the State of Kansas. State v. Reed, 53 Kan. 767, 37 P. 174.

It appears, from the trial court's reasoning, that it arbitrarily discharged the jury before a verdict because it was dissatisfied with the manner in which the trial was conducted and a discharge for such reason will operate as an acquittal under the authority of State v. Allen, 59 Kan. 758, 54 P. 1060. Too, it should be noted that our Supreme Court of Kansas has held, in the Allen case, supra, that the essential fact upon which the discharge is based and the finding of the court thereon must be entered of record and unless the record shows the existence of such fact and the decision of the court thereon and that they constitute sufficient

grounds for discharge, the defendant cannot again be put on trial for the same offense.

Regarding the above stated proposition of law, the trial court's record made at the time of declaring a mistrial does not show a statutory ground for declaring a mistrial, it does not show an absolute necessity for declaring a mistrial and certainly, under those conditions, the defendant cannot again be put on trial for the same offense.

Point Two: It is apparent, from the facts herein elucidated, that the defendant was placed upon trial on a felony charge in a court of competent jurisdiction. The second amended information was sufficient to sustain a conviction, as a matter of law, in this cause because the court had overruled the motion to quash it. He was tried before a jury duly empanelled and sworn to try the cause. The state introduced its evidence and rested and the defendant then moved for his discharge and a directed verdict, and the court, in lieu of ruling thereon, declared a mistrial and discharged the jury upon purported trial errors, without the request of the defendant, nor upon an absolute necessity, nor upon a ground provided by statute. The court then ordered a new and amended third information be filed. The latter information charges the defendant with the identical offense with which he was charged in the second amended information. It follows, that if, as a matter of law, the defendant was acquitted by the court's having unlawfully declared a mistrial, then it is a bar to a further prosecution of the defendant for the same offense a second

time under the rights and immunities afforded him under the Fifth Amendment to the Constitution of the United States and the Bill of Rights of the State of Kansas.

The Due Process of Law clause, Amendment Five to Amendments to the Constitution of the United States, provides, among other things, that no person shall be subject for the same offense to be twice put in jeopardy of life or limb and Section Ten of the Bill of Rights to the Constitution of Kansas provides, in substance, that no person shall be twice put in jeopardy for the same offense.

In conclusion, we respectfully submit that the action of the trial court, in declaring a mistrial, as indicated by the record, has acquitted the defendant, as a matter of law, upon the charge lodged against him in the second amended information upon which he was tried and he cannot again be tried upon the third amended information filed, which information charges the identical offense upon which he was previously tried, without depriving the defendant of the guarantees afforded him under and by virtue of his federal and state Constitutional rights. Also we submit that this case is one calling for the exercise of this Court of supervisory powers by issuing a writ of certiorari to the Supreme Court of the State of Kansas.

MARK H. ADAMS,
A. D. WEISKIRCH,
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SUPREME COURT of The UNITED STATES

OCTOBER TERM, 1949

No. 339

In the Matter of the Petition of
LEE KAMEN for a Writ of Habeas Corpus,
Petitioner,
vs.
ROBERT GRAY,
Sheriff of Sedgwick County, Kansas,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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of Wichita, Kansas;
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